Supreme Court, U.S.
FILED
FEB 4 2000
CLERK

(2)

No. 99-812

In the Supreme Court of the United States

RUSSELL BRIDENBAUGH,
Petitioner,

v.

FRANK O'BANNON, Governor of Indiana,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S OPPOSITION

JEFFREY A. MODISETT
Attorney General of Indiana

JON LARAMORE
Counsel of Record
Deputy Attorney General
219 State House
Indianapolis, IN 46204
317-233-6582

16pp

Question Presented

Indiana designates Good Friday as a holiday for State employees. The sole stated purpose for the holiday is to give employees a day off during a four-month Spring period that would otherwise be without a scheduled holiday. Because a large percentage of private employers and schools in Indiana also designate a Good Friday holiday, many State employees' families already are off on that day.

The question presented in this case is whether Indiana's Good Friday holiday violates the Establishment Clause.

Table of Contents

Question Presented i

Statement of the Case 1

Reasons for Denying the Writ 5

I. There is no circuit conflict 5

II. The Seventh Circuit followed precedent 8

Conclusion 11

Table of Authorities

Cases

Americans United for Church & State v. Kent County, 293 N.W.2d 723 (Mich. App. 1980) 7, 8
California School Employees Ass'n v. Sequoia Union High School Dist., 67 Cal. App. 3d 157, 136 Cal.Rptr. 594 (1977) 7, 8
Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992) 5, 6
Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 9
Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 7
County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) 10
Franks v. Niles, 1982 WL 460, 29 Fair Emp. Prac. Cas. (BNA) 1114 (N.D.Ohio 1982) 6
Freedom from Religion Fndtn. v. Thompson, 920 F. Supp. 969 (W.D. Wis. 1996) 7
Granzeier v. Middleton, 173 F.3d 568 (6th Cir. 1999) .5, 6, 9
Griswold Inn, Inc. v. State, 183 Conn. 552, 441 A.2d 16 (1981) 7
Koenick v. Felton, 190 F.3d 259 (4th Cir. 1999), *cert. denied*, 68 USLW 3337 (1/18/00) 5, 6
Lemon v. Kurtzman, 403 U.S. 602 (1971) .4, 5, 6, 7, 8, 9, 10
Lynch v. Donnelly, 465 U.s. 668 (1984) 9
Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal.Rptr. 244 (1976) 7
Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) 6, 7

Statutes

Ind. Code § 1-1-9-1(a) 1
Wisc. Stat. § 895.20 7

No. 99-812

In the Supreme Court of the United States

RUSSELL BRIDENBAUGH,
Petitioner,

v.

FRANK O'BANNON, Governor of Indiana,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S OPPOSITION

Statement of the Case

1. Since 1941, Indiana's statutes have set aside as a holiday for State employees, "Good Friday, a movable feast day." Ind. Code § 1-1-9-1(a); App. 21a. No legislative history illuminates why legislators enacted the holiday at that time. App. 23a.

The effect of this holiday is to give most State employees the day off with pay. App. 22a. Most Indiana State offices are closed on Good Friday. *Id.* Those

employees who have to work on legal holidays -- such as prison, State Police, and state hospital employees -- receive either additional monetary compensation or compensatory time off in exchange for working on the holiday. *Id.*

Although Good Friday is a solemn and holy day for Christians, Indiana does not celebrate the religious aspects of Good Friday. App. 23a, 14a. There are no State-sponsored public commemorations of the day. *Id.* Aside from closing State offices to give State employees a Spring holiday, the State stipulated that it was unaware of any other way in which Good Friday itself has become a secular holiday in Indiana, although Good Friday part of Easter weekend, which has significant commercial activity and other secular aspects. App. 26a.

The parties to this case stipulated that the State's sole specified purpose for the Good Friday holiday is to provide a Spring holiday for State employees. App. 24a. Indiana is generous in providing holidays to its employees, with 14 State holidays in election years and 12 in non-election years. *Id.* In election years, Indiana ranks in the top 3% of employers nationwide in the number of holidays provided to employees. *Id.* Indiana's employment philosophy is that a generous number of vacation days benefits the State as an employer because deviations from the normal work schedule bolster employee efficiency. App. 25a.

Good Friday falls during a long period of the year that would otherwise be without a holiday for Indiana employees. App. 25a. Without the Good Friday holiday or another comparable Spring holiday, a period of more than four months would elapse without a holiday, from Martin Luther King, Jr.'s birthday in mid-January to Memorial Day at the

end of May.[1] *Id.* This long period without a holiday occurs because Indiana's practice is to move the holidays for Lincoln's Birthday and Washington's Birthday to the day after Thanksgiving and a day adjacent to Christmas to lengthen the periods of those holidays. *Id.* For example, in 1997 Lincoln's Birthday was celebrated November 28, and Washington's Birthday was celebrated December 26. *Id.*

Indiana is not alone in designating Good Friday as a holiday. Nationally, 35% of employers give the day off to their employees, and 44% do so in the East Central region, where Indiana is located. App. 26a. In the East Central region, 34% of governmental employees designate a Good Friday holiday, as do 52% of educational employers. *Id.*

2. This action was brought in the United States District Court for the Southern District of Indiana by Russell Bridenbaugh, a taxpayer in the State of Indiana. He challenged Indiana's Good Friday holiday as a violation of the Establishment Clause.

The case was presented to the district court on stipulated facts and both parties' motions for summary judgment. It ruled that Indiana met its burden of proving a secular purpose for its Good Friday holiday, "to provide a long weekend -- a spring holiday -- for its employees." App. 29a. Indiana could legitimately choose Good Friday, a religious holiday, for its Spring holiday "as an accommodation to those state employees whose children are out of school and/or spouses are off work" because many schools and private employers are closed on the same day.

---

[1] In election years, the primary election day holiday occurs on the first Tuesday after the first Monday in May. In election years, the time period without a holiday would be just short of four months.

App. 30a. The district court therefore granted summary judgment in favor of Indiana.

3. The Seventh Circuit affirmed the district court with one judge dissenting. The panel majority applied the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), requiring examination of whether (1) the law has a secular purpose; (2) the principal effect of the law advances or inhibits religion; and (3) the law fosters excessive entanglement with religion. App. 4a.

The majority ruled that Indiana's stated justification for the Good Friday holiday -- to provide a Spring holiday for employees during a period with no other break from the regular work schedule -- is a legitimate secular purpose. App. 7a-8a. The majority noted that Good Friday was a logical choice for the holiday because a large number of schools and private employers are closed on the same day. *Id.*

The majority declined Bridenbaugh's invitation to rule that Good Friday could never be secularly justified as a holiday because of its inherent religious character. App. 9a. It also ruled that Bridenbaugh had failed to show that Indiana's stated purpose for the holiday was a sham. App. 12a.

The majority also rejected Bridenbaugh's argument that the Good Friday holiday impermissibly advances religion. App. 13a-14a. The majority reasoned that although the Good Friday holiday facilitates the religious observance of practicing Christians, that result is too indirect and remote to constitute advancement of religion under *Lemon*. *Id.* The majority found this conclusion bolstered by the fact that

Indiana as a State takes no action to endorse or celebrate Good Friday. App. 14a.

Senior Circuit Judge Fairchild dissented. He concluded that the State's evidence that many people travel over Easter weekend and that many schools and businesses also are closed on Good Friday did not sufficiently support Indiana's choice of Good Friday, as opposed to a Spring day without religious significance, as Indiana's Spring holiday. App. 17a. He also concluded that Indiana's Good Friday holiday impermissibly advances religion by making it easier for Christian State employees to celebrate their holiday than for adherents of other religions, whose religious holidays are not State holidays. App. 18a.

Reasons for Denying the Writ

I. There is no circuit conflict.

The circuits agree on the proper test to determine the legality of a Good Friday holiday. All of the circuits require (1) a "valid secular justification" for the holiday, (2) that the holiday does not have "the principal effect of advancing religion," and (3) that it not foster excessive entanglement between church and state. *Bridenbaugh v. O'Bannon*, App. 4a, 5a, 12a-13a.

Thus, the circuits all uniformly apply the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), in Good Friday cases. *Bridenbaugh*, App. 4a; *Granzeier v. Middleton*, 173 F.3d 568, 572 (6th Cir. 1999); *Koenick v. Felton*, 190 F.3d 259, 265 (4th Cir. 1999), *cert. denied*, 68 USLW 3337 (1/18/00); *Cammack v. Waihee*, 932 F.2d 765, 773 (9th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992). The district court opinion cited in Bridenbaugh's petition also

applied *Lemon*. *Franks v. Niles*, 1982 WL 460, 29 Fair Emp. Prac. Cas. (BNA) 1114 (N.D. Ohio 1982).

In these cases, the circuits approved Good Friday holidays in Indiana, Kentucky, Maryland, Hawaii, and Ohio, respectively. In each case, the court found a valid secular justification for setting aside Good Friday as a State holiday. As in this case, other circuits determined it was appropriately secular for governmental entities to give employees a Spring holiday. *Granzeier*, 173 F.3d at 574; *Koenick*, 190 F.3d at 266; *Cammack*, 932 F.2d at 776. The courts of appeals determined that Good Friday was an appropriate holiday because it was a common day for families to travel and it coincided with time off given by schools and other employers. *Granzeier*, 173 F.3d at 574; *Koenick*, 190 F.3d at 266. As in this case, other circuits determined that the benefit to Christian believers who could attend religious services without taking time off was incidental to the holiday's primary secular purpose.

The cases invalidating Good Friday holidays also applied *Lemon*, but they reached a differing result on different facts. The Seventh Circuit's opinion invalidating Illinois' Good Friday statute, *Metzl v. Leininger*, 57 F.3d 618, 620 (7th Cir. 1995), did not get past the first of *Lemon*'s three prongs. The Seventh Circuit found that Illinois had failed to show any secular justification for its statute requiring schools to close on Good Friday. *Id.* Illinois failed to prove that absentee rates would be high on Good Friday or that there was any other reason it would be difficult to keep schools open on Good Friday, nor did it advance any other secular justification. *Id.* at 622-23. In his opinion, Chief Judge Posner expressly stated that Illinois might be able to validly re-enact the Good Friday school holiday if it expressed a

secular justification, such as creation of a Spring holiday. *Id.* at 623-24.

Following *Lemon* as construed by *Metzl*, a district court in Wisconsin invalidated a four-hour Good Friday holiday because it lacked secular purpose. *Freedom from Religion Foundation v. Thompson*, 920 F. Supp. 969 (W.D. Wis. 1996). Indeed, the invalidated Wisconsin statute explicitly stated that the purpose of the holiday was to permit religious observance, 920 F. Supp. at 922 (citing Wisc. Stat. § 895.20), negating any secular purpose.

Similarly, in *Mandel v. Hodges*, 54 Cal. App. 3d 596, 127 Cal.Rptr. 244 (1976), the California Court of Appeals applied *Lemon* to invalidate a three-hour Good Friday holiday because California failed to show a secular purpose and the hours of the holiday coincided with the most common times for Good Friday religious services. 54 Cal. App. 3d at 612-13; 127 Cal.Rptr. at 254-55. The Connecticut Supreme Court applied the same test (attributing it to *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973)) to invalidate a prohibition on Good Friday liquor sales, also finding no secular purpose. *Griswold Inn, Inc. v. State*, 183 Conn. 552, 441 A.2d 16 (1981).

The cases show neither doctrinal disparity nor a split among the circuits.[2] Although Bridenbaugh suggests that

---

[2] Two other cases approve Good Friday holidays that were created through collective bargaining. *California School Employees Ass'n v. Sequoia Union High School Dist.*, 67 Cal. App. 3d 157, 136 Cal.Rptr. 594 (1977); *Americans United for Church & State v. Kent County*, 293 N.W.2d 723 (Mich. App. 1980). These cases emphasized that choice of days off lay largely with employees' representatives and that there were practical, secular reasons for employees to select Good Friday as part of a package of public employee holidays. *California School Employees*, 67

there is "conflict and confusion" among the lower courts on the issue of Good Friday holidays, he has demonstrated none. Rather, the cases show that all the lower courts have applied the *Lemon* standard, as did the Seventh Circuit in this case, and that disparities in results arise only from different factual circumstances. This uniformity does not justify granting the writ.

II. The Seventh Circuit followed precedent.

The Seventh Circuit's decision represents no departure from the Court's Establishment Clause jurisprudence. In fact, on close examination, Bridenbaugh's complaint is not that the Seventh Circuit misinterpreted or corrupted doctrine, but only that the Seventh Circuit misapplied the law to the facts of this case. Moreover, Bridenbaugh's recitation of the facts is wrong.

Only the second prong of the *Lemon* test -- the prong that implicates endorsement -- is at issue in this case. Indiana has articulated a secular purpose for its holiday -- giving employees a Spring holiday during a period with no other holiday, on a day when many private employers and schools also give time off. App. 8a. Indiana thus has met the first *Lemon* prong. Also, there is no dispute in this case that Indiana's Good Friday holiday causes no entanglement between church and state, so the third *Lemon* prong is satisfied.

Bridenbaugh's complaint is that the Good Friday holiday impermissibly advances religion under the second prong of *Lemon* or, put another way, that it impermissibly endorses religion under what has been referred to as the

---

Cal. App. 3d at 160-61, 136 Cal.Rptr. at 595-96 (citing *Lemon*); *Americans United*, 293 N.W.2d at 726.

endorsement test. *See Lynch v. Donnelly*, 465 U.S. 668, 699 (1984) (O'Connor, J., concurring) (articulating endorsement test); *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (same). *See also Granzeier*, 173 F.3d at 573 (explaining Sixth Circuit's treatment of endorsement test as elaboration of second prong of *Lemon*).

But Bridenbaugh's point is not that the Seventh Circuit got the doctrine wrong or that the doctrine is unsettled (although he advertises "doctrinal confusion" in his petition, Pet. at 9). Rather, Bridenbaugh simply disagrees with the Seventh Circuit's application of the law to the facts in this case. Specifically, Bridenbaugh argues that the Seventh Circuit approved Indiana's holiday "without requiring Indiana to demonstrate any secular reason why it selected Good Friday over [other] available dates." Pet. 11. Because most businesses and schools in Indiana are open on Good Friday, Bridenbaugh says "Indiana never explained why it chose to set Good Friday as a state holiday when it is not recognized as such by the remainder of the state." *Id.*

Bridenbaugh is simply wrong about the facts in this case, because Indiana provided the explanation he claims to be lacking. Although most schools and businesses in Indiana are open on Good Friday, a large percentage of them are not. App. 26a. In Indiana's region, 44% of employers and 34% of governmental employers observe a Good Friday holiday, and so do 52% of educational employers.[3] Among all Spring days, therefore, it is appropriate for Indiana to choose Good Friday as a holiday because many state employees' spouses and children have the day off already, as the Seventh Circuit held. App. 8a ("it is logical for the State to choose that day

[3] The figure for educational employers apparently includes higher education. In 1997, 89 of Indiana's 293 public school districts observed a Good Friday holiday. App. 26a.

as its spring holiday, as an accommodation to those state employees whose children are out of school and/or spouses are off work"(quoting district court opinion)).

As the Seventh Circuit properly found, Indiana's designation of a Good Friday holiday is neither advancement of religion under *Lemon* nor endorsement for at least two reasons. First, Indiana's selection of Good Friday is recognition that it is a day that many private, public, and educational employers already provide as a day off. It represents recognition that many state employees would seek the day off to spend time with their families. App. 8a.

Second, no endorsement of religion can be implied because Indiana does not otherwise celebrate or recognize Good Friday. App. 11a; *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 595 (1989) (plurality) (state recognition of religious holidays is not endorsement if state does not focus on religious message). Indiana holds no celebrations or commemorations that could be taken to imply endorsement. App. 14a. On these bases, the Seventh Circuit properly concluded that "the State has established several legitimate secular justifications for the Good Friday holiday, and has presented evidence supporting those justifications"; it also properly concluded that any advancement of religion was too remote to have constitutional significance. App. 13a-14a.

Bridenbaugh has failed to show that this case raises any issue beyond whether the lower courts properly applied *Lemon* to the facts of this case. Nothing in the Seventh Circuit's approach to Establishment Clause jurisprudence justifies granting the writ.

Conclusion

This Court should deny the petition for writ of certiorari.

JEFFREY A. MODISETT
Attorney General of Indiana

JON LARAMORE
Counsel of Record
Deputy Attorney General

219 State House
Indianapolis, IN 46204
317-233-6582